Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 95-110
	)	
Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stay of Certain Allocations Orders	)	

To: The Commission

COMMENTS OF ROY E. HENDERSON

Roy E. Henderson ("Henderson"), permittee of KHEN(FM) in Caldwell, Texas, and proponent of RM-7419 and RM-7797 in Docket 91-58, by his counsel, hereby files the instant Comments responsive to the above-captioned Notice of Proposed Rulemaking ("NPR") as released by the Commission on July 21, 1995. For the reasons set forth below, Henderson opposes the Commission's proposed deletion of the automatic stay provisions presently contained in 47 C.F.R. Section 1.420(f) and submits that the changes included in the NPR are contrary to the public interest and should not be adopted.

The automatic stay provisions of 1.420(f) were initially adopted for a good and useful purpose which has not changed since that time, i.e. a recognition of the disruption and expense to both the public and the Permittee/Licensee that would be attendant to any proposed change in the Table of Allocations that would have the effect of forcing an existing permittee/licensee to change its operating channel in order to accommodate a new

proposal by another party. Given the disruption that would result from any such ex post facto change, it would seem only logical to be sure that any such proposed change complied with all requirements of logic and law before forcing them upon unwilling third parties. That is exactly what the appeal process is for and it remains most reasonable to be sure the proposed change is appropriate and legally defensible before forcing it upon the community and other existing Permittee/Licensees.

The Commission's stated reason to remove the automatic stay is that it now believes that third party appeals of Commission proposals to force them to modify their operating channels are often "meritless,...with only a very small percentage ... ultimately successful", and that "The automatic stay provides an incentive for parties to challenge agency approval of a competitor's modification proposal simply to forestall institution of a new competitive service."

Aside from the fact that such reasons are total speculation and unsupported by any factual data in the NPR, they are, even if true, totally insufficient to support the rule change. What about that "very small percentage" that were ultimately successful in demonstrating to a reviewing Commission or Court that the the proposal to force them from their operating channels was indeed contrary to logic or law? Under the proposed change, it would just be 'tough luck, sorry about that, after being forced from your channel you can now make another change back to where you were originally'. What kind of relief would that be to the

Permittee/Licensee or to the community it serves? Would this not implicitly constitute the irreparable injury that requires such a stay? 1/

If anyone has to bear the burden of a delay or of defending such a proposed change, should it not most equitably be the petitioner seeking to force the change rather than the Permittee/Licensee who is being forced to make the change to accommodate that petitioner? This would appear to be much more consistent with the provisions of Section 316(b) which places the burden of proceeding and of proof upon the Commission, not the Permittee/Licensee, in any hearing conducted in cases where such a change is being forced upon an existing Permittee/Licensee.

Beyond that, it should be noted that the automatic stay provisions only apply in cases where a petitioner is seeking to force a change of operating channel upon someone else and someone else's community in order to accommodate that petitioner's own desires to make its own changes. 2/ To the extent that a

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1/ Oddly enough, while the Commission addresses the "risk" that a petitioner would have to bear if it decided to construct while a staff decision was still on appeal (paragraph 9), it shows no such concern for the Permittee/Licensee who would have been forced (not "decided") at the same time to make the very change that it was appealing.

2/ We do not understand why the Commission applies the automatic stay provision to changes proposed in the Petitioner's own channel since that is the Petitioner's own choice to make and involves no forced relocation of someone else's channel. Since there does not seem to be a great demand to protect the Petitioner from itself, we would not oppose deleting the automatic stay provisions from such cases where the only change in a presently occupied channel is the Petitioner's own channel.

petitioner can make a proposal that fits without requiring someone else to change to make it fit, the petitioner has no problem with an automatic stay. In those few cases where such a disruption is proposed for another community and another Permittee/Licensee, it is not too much to ask that the Permittee/Licensee be allowed to pursue its legal rights of review before being required to accept and suffer the harm resulting from the forced change.

The automatic stay provisions of 1.420(f) serve a useful purpose in protecting the rights of a Permittee/Licensee and its community against the negative effects of being forced to change its operating channel before it has had an opportunity to pursue its legal rights to appeal such a proposal. The rule is not "broken" and does not need to be "fixed". If the Commission is concerned as to the time required to process an appeal of a staff ruling, it need only apply its own resources to expediting any such review. This should be especially easy in any such case where the appeal is really as "meritless" as the Commission seems most concerned with here (Paragraph 6). In addition, the Petitioner who has proposed such a forced change of existing channel allocations is also free to seek expedited review of the staff decision in such "meritless" cases. Given the requirement that any such Permittee/Licensee must exhaust its administrative remedies as a condition precedent to filing a judicial appeal, it seems doubly unfair for the Commission to seek to penalize the Permittee/Licensee for the Commission's own delay in completing its own processing of such appeals.

In sum, we submit that the one area where the Commission might logically adopt a change is in its current policy of applying the automatic stay provisions to cases where only the petitioner's own existing channel would be changed. It would not seem that any automatic stay protection would be needed there and it could be deleted. Beyond that however, we submit that the automatic stay provisions are necessary and appropriate for any Permittee/Licensee such as Henderson, which has been ordered in a staff action (in Docket 91-58) to change his channel in order to accommodate the proposal of another petitioner, where the Permittee/Licensee believes that the staff action is patently in error and a Petition for Reconsideration of that action detailing such error has been filed, and where legal rights of appeal are being, and will be, diligently pursued as required.

Should the Commission nonetheless decide to delete the automatic stay provisions of 1.420(f), it should do so on a prospective basis only and it should not apply to any appeals already in progress at the time of adoption of such a Report and Order since that would only result in further inequity to Permittee/Licensees and their communities, and needless disruption of cases in progress.

Wherefore, it is respectfully submitted that the proposal set forth in Docket 95-110 is contrary to the public interest and should not be adopted.

Respectfully Submitted,

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by _____
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